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Reasons for decision

Teamsters Canada Rail Conference,

applicant,

and

Canadian National Railway Company,

respondent,

and

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers); and Teamsters Canada Rail Conference, Maintenance of Way Employees Division,

intervenors.

Board file: 27730-C

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada),

applicant,

and

Canadian National Railway Company,

respondent,

and

Teamsters Canada Rail Conference; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers); and Teamsters Canada Rail Conference, Maintenance of Way Employees Division.

intervenors.

Board file: 27767-C

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers),

applicant,

and

Canadian National Railway Company,

respondent,

and

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada); and Teamsters Canada Rail Conference,

intervenors.

Board File: 26722-C
Neutral Citation: 2011 CIRB **563**
January 12, 2011

The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Daniel Charbonneau and Patrick J. Heinke, Members.

Counsel of Record

Mr. Robert Monette, for the Canadian National Railway Company;

Mr. Michael A. Church, for the Teamsters Canada Rail Conference;

Mr. Lewis Gottheil, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada);

Mr. Mark Rowlinson, for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers);

Mr. Michael J. Prokosh, for the Teamsters Canada Rail Conference, Maintenance of Way Employees Division.

These reasons for decision were written by Ms. Elizabeth MacPherson, Chairperson.

I–Nature of the Applications

[1] On September 22, 2009, the Teamsters Canada Rail Conference (TCRC) filed an application (Board file no. 27730-C) pursuant to sections 18, 18.1, 35, 44 and 45 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*), seeking to have running trades employees working on various short line rail operations that had been repurchased by Canadian National Railway (CN or the employer) reintegrated into the mainline bargaining units and collective agreements. TCRC's application affects running trades employees on three short lines in Alberta and the Northwest Territories: the Athabasca Northern Railway (ANY), the Mackenzie Northern Railway (MKNR) and the Lakeland & Waterways Railway (LWR).

[2] On October 8, 2009, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (the CAW) filed an application (Board file no. 27767-C) pursuant to sections 18, 18.1, 35, 44 and 45 of the *Code*, seeking to have the shopcraft employees of MKNR reintegrated into the mainline bargaining unit that it represents.

[3] On January 19, 2010, the Board determined that the TCRC and CAW applications raised similar issues and ordered that they be heard together pursuant to section 20 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*). Each applicant was granted intervenor status

in the others' application. Following a case management teleconference with the parties, the Board gave notice to all of the unions representing employees on the various short line railways owned by CN on May 19, 2010, advising them that the Board's decision in these applications could establish a precedent with respect to the determination of appropriate bargaining units and representation rights for short line employees. As a result of these notices, the Board received two applications for intervenor status. Teamsters Canada Rail Conference, Maintenance of Way Employees Division (TCRC-MWED) was granted intervenor status in the TCRC and CAW applications, as it represents maintenance of way employees at MKNR. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers) and its local 2004 (collectively, the USW) was granted intervenor status as they had raised similar issues in a pending application involving maintenance of way employees working for the Savage Alberta Railway (Board file no. 26722-C). At the request of the parties, the Board did not consolidate the USW's application with the TCRC and CAW applications, although these organizations were granted reciprocal intervenor status in the USW application. It was understood by all parties that determination of the USW's application would follow the Board's determination of the TCRC and CAW applications.

[4] The Board had originally scheduled an oral hearing of the TCRC and CAW applications for September 27 to October 1, 2010. The Board conducted a case management teleconference on September 21, 2010, to consider the parties' request that the hearing be adjourned. During this teleconference, the parties and the intervenors agreed that an oral hearing was not required in either of these matters and that the Board could proceed on the basis of their written submissions. As section 16.1 of the *Code* permits the Board to decide any matter before it without holding an oral hearing, the Board agreed to proceed with these matters by way of written submissions. The Board has also taken the opportunity to consider the written submissions filed with respect to the USW's application and this decision therefore applies to all three applications.

II–Facts

[5] CN is one of five Class 1 rail carriers operating in Canada, and one of only two with nationwide operations. Between 1996 and 1999, CN divested itself of some 6,000 miles of rail line, either by

abandoning the lines or selling them to various independent local operators. These "short lines" compete with local and long-haul trucking to provide a direct link to rail networks for shippers located on branch lines. Although CN is federally regulated, the short lines that operated intra-provincially became subject to provincial labour relations laws once they were sold. In some, but not all cases, the unions representing the employees on these short lines continued to represent them, either through voluntary recognition by the new owners or certification by a provincial labour relations board. The parties negotiated collective agreements setting out the terms and conditions of employment applicable to the short line work.

[6] However, beginning in 2006, CN began repurchasing certain of these short lines and reintegrating them into its national rail network. The applications that are the subject of this decision relate to four short lines in Alberta repurchased by CN: the Athabasca Northern Railway (ANY), the Mackenzie Northern Railway (MKNR), which also runs into the Northwest Territories, the Lakeland & Waterways Railway (LWR) and the Savage Alberta Railway (SAR).

A–ATHABASCA NORTHERN RAILWAY (ANY)

[7] In September 1997, CN sold the 202 miles of track between Boyle and Fort McMurray, Alberta to CANDO Contracting Ltd., which operated the line as the Athabasca Northern Railway. On August 29, 2006, the TCRC was certified by the Alberta Labour Relations Board (ALRB) as the bargaining agent for a unit of locomotive engineers and conductors at ANY. The parties held one bargaining session in November 2006 but subsequent bargaining sessions were cancelled by the employer. As a result, no collective agreement was ever negotiated for this unit. In June 2007, the employer advised the TCRC that it was seeking a buyer and would not operate the line after December 2007. CN repurchased the line in December 2007.

[8] On April 4, 2008, the TCRC filed an application with the Board (Board file no. 26813-C) invoking sections 44(3) and 46 of the *Code*, seeking a declaration that a sale of business and change of jurisdiction had taken place and recognition that it continued to be the bargaining agent for the unit that had been certified by the ALRB. CN did not oppose this application and none of the parties questioned the appropriateness of the bargaining unit that had been certified by the ALRB.

[9] By order dated June 25, 2008 (Order no. 9472-U), the Board determined that a sale of business had occurred, that CN was the successor employer and that the business was in federal jurisdiction. The Board retained the bargaining unit configuration that the ALRB had granted, which combines the locomotive engineers and conductors in a single unit. As of the date of the TCRC application giving rise to this decision, this unit was still without a collective agreement.

[10] The Board was not provided with any information concerning the number of maintenance of way and/or shopcraft employees at ANY, but understands that any such employees are currently unrepresented.

B–MCKENZIE NORTHERN RAILWAY (MKNR)

[11] In May 1998, RaiLink Canada Ltd. (RaiLink) purchased 602 miles of track between Smith, Alberta and Hay River, NWT from CN. RaiLink consolidated the lines and operated them under the name McKenzie Northern Railway. It voluntarily recognized the four unions that had represented employees on these lines when they were owned by CN (namely, the Canadian Council of Railway Operating Unions (the CCROU, which was composed of the Brotherhood of Locomotive Engineers and the United Transportation Union); the Brotherhood of Maintenance of Way Employees (BMWE); the CAW and the International Brotherhood of Electrical Workers). The unions formed a voluntary council and negotiated collective agreements with RailLink in 1998, 2001 and 2004. The 2004–2008 agreement recognized "the unique principles and conditions existing within a regional railway industry that are not applicable to the major railroads."

[12] In September 2005, RaiLink applied to the Board pursuant to section 18.1 of the *Code*, asking that the five bargaining units at MKNR be consolidated into one, with a single bargaining agent. By this time, the CCROU had been dismantled, the TCRC represented the locomotive engineers' bargaining unit and the UTU represented the conductors. RaiLink argued that, with five bargaining agents representing a total of 90 employees, the bargaining unit structure was no longer viable or conducive to harmonious labour relations practices. However, CN repurchased the MKNR lines in January 2006, and this section 18.1 application was withdrawn. CN and the unions continued to

operate under the terms of the collective agreement that had been signed in 2004 with an expiry date of May 2, 2008.

[13] In March 2008, the TCRC filed an application seeking to displace the United Transportation Union (UTU) as bargaining agent for the conductors and assistant conductors' bargaining unit. CN had voluntarily recognized the UTU when it repurchased the line in 2006, and it made no representations to the Board regarding the merits of the displacement application. None of the parties raised any issues regarding the appropriateness of the bargaining unit, other than to agree that it did not include trainees. Following the conduct of a representation vote, the Board certified the TCRC to represent this unit on June 25, 2008 (Order no. 9473-U).

C–LAKELAND AND WATERWAYS RAILWAY (LWR)

[14] The short line known as the Lakeland and Waterways Railway consists of 115 miles of track between Edmonton and Boyle, Alberta. After this line was sold by CN to Rail America in 1998, jurisdiction over labour relations rested with the province. There is no evidence that any of the unions representing employees at CN sought successor rights with respect to LWR employees following the sale. As a result, the employees at LWR were unrepresented and remain so despite the repurchase of the line by CN in 2006. According to CN, there are 12 employees affected by the instant applications.

D–SAVAGE ALBERTA RAILWAY (SAR)

[15] The fourth CN short line in Alberta, which is not part of the TCRC and CAW applications but is the subject of the USW's application in Board file no. 26722-C is the Savage Alberta Railway (SAR). The SAR consists of 340 miles of track between Swan Landing and Grand Prairie and points north and west, which was sold by CN to Alberta Railnet Inc. in June 1999. The assets of Alberta Railnet Inc. were subsequently sold to Savage Industries Limited, which incorporated Savage Alberta Railway Inc. to operate these assets as the Savage Alberta Railway. CN repurchased the property in December 2006.

[16] By virtue of a certification order issued by the ALRB (194-2002), Local 4001 of the CAW represents a unit of 20 locomotive engineers and conductors working on the SAR. The collective agreement applicable to this unit, which was negotiated between the CAW and the SAR in July 2006, expired on December 31, 2009. The Board has received a petition from the employees in this bargaining unit indicating that they wish to continue to be represented by the CAW.

[17] The pending USW application (Board file no. 26722-C), seeks representation rights for a unit of 12 maintenance of way employees at SAR who are currently unrepresented. The application seeks a declaration under section 18 of the *Code* that these employees are within the scope of the USW's existing mainline bargaining unit, or in the alternative, certification for a separate unit of SAR maintenance of way employees. As noted above, the TCRC and CAW were granted intervenor status in the USW application and have made representations similar to those made in Board files nos. 27730-C and 27767-C.

[18] Although the USW's application (Board file 26722-C) was not consolidated with the TCRC and CAW applications involving the ANY, MKNR and LWR short lines, this decision applies equally to the USW application involving the SAR.

[19] The following chart illustrates the bargaining units at CN that are affected by the three applications:

	Locomotive Engineers	**Conductors, trainmen, yardmen etc**	**Maintenance of Way**	**Shopcraft employees**
CN (Mainline)	TCRC (cert. 8630-U; 8/4/2004) Agr. 1.2 exp. 31/12/2011	TCRC (cert. 9507-U; 2/9/2008) Agr. 4.3 exp. 22/7/2013	USW (cert. 8745-U; 25/11/2004) Agr. 10.1 exp. 31/12/11	CAW (cert. 6495-U; 29/6/1994) Agr. 12 exp. 31/12/10
ANY Boyle to Fort McMurray, Alta. sold: Sept.1997 repurchased: Dec. 2007	TCRC (9472-U issued 25/6/2008) 16 employees; no collective agreement	(NB - combined unit per ALRB cert. 124-2006 adopted by CIRB in 9472-U)	non-union	non-union

MKNR Smith, Alberta to Hay River NWT sold: May 1998 repurchased: Jan. 2006	TCRC (vol recog.) 25 employees Agr. 3.1 exp. 2/5/2008	TCRC (9473-U issued 25/6/2008) 20 employees Agr. 3.2 exp. 2/5/2008	TCRC-MWED (vol. recog.) 22 employees (32 positions) Agr. 3.3 exp. 2/5/2008	CAW Local 100 (vol. recog.) 10 employees Agr. 3.4 exp. 2/5/2008
LWR Edmonton to Boyle, Alberta sold: Nov. 1998 repurchased: Jan. 2006	non-union	non-union	non-union	non-union
SAR Swan Landing to Grand Prairie sold: June 1999 repurchased: December 2006	CAW, Local 4001 20 locomotive engineers and conductors collective agreement exp. 31/12/09	(NB - combined unit per ALRB cert. 194-2002)	USW application pending for unit of 12 employees	non-union

III–Positions of the Parties

A–The TCRC

[20] The TCRC holds four bargaining unit certificates that are relevant to this application: 8630-U, issued on April 8, 2004 in respect of a national unit of locomotive engineers at CN; 9507-U, issued on September 2, 2008 in respect of a national unit of conductors, trainmen, yardmen and others at CN; 9472-U, issued on June 25, 2008 in respect of a unit of locomotive engineers and conductors at ANY; and 9473-U, issued on June 25, 2008 in respect of a unit of conductors and assistant conductors working at MKNR.

[21] The TCRC takes the position that, as CN reacquired the various short lines, it reintegrated those operations and the employees into CN. Following the repurchase of MKNR in 2006, CN and the TCRC continued to apply the collective agreement in place for those units. In March 2008, the TCRC wrote to CN, suggesting that the running trades employees at ANY and LWR be incorporated into the MKNR collective agreement to allow all three properties to be addressed simultaneously.

Although the MKNR collective agreement expired on May 2, 2008, as of the date of the TCRC's application, the parties had not yet negotiated a renewal agreement for any of the affected short lines.

[22] The TCRC states that the current bargaining unit structure, which has maintained separate bargaining units for the short line employees, is not appropriate for collective bargaining, as evidenced by the parties' inability to successfully negotiate collective agreements for these small units. It argues that the employees in the short line bargaining units perform the same work for the same employer as those working on the mainline and should therefore be brought back into the mainline collective agreements, which it argues is the status quo that existed prior to CN's divestiture of the lines in question. The TCRC states that there is no valid or persuasive labour relations reason to treat the short line employees any differently than the other CN employees it represents, that the two groups have an obvious community of interest and that the impacts of integration could be dealt with through the negotiation of homestead rights. The TCRC argues that CN currently requires mainline running trades employees to work on the short lines because of employee shortages. The union submits that this demonstrates that the employer's claim that there would be friction and disruption if the two groups were integrated is not supportable. The TCRC also notes that CN has already integrated MKNR employees represented by the International Brotherhood of Electrical Workers (IBEW) into the mainline collective agreement and that its members should be put on the same footing as their fellow CN running trades employees.

[23] The TCRC seeks an order confirming that there has been a sale of business from each of the independent short line operators to CN and that CN is the successor employer. It asks the Board to consequently review the existing bargaining unit structure and order that the short line bargaining units be merged with the national bargaining units that it is certified to represent. In the alternative, it asks that CN be declared a single employer with the ANY, MKNR and LWR and that the CN collective agreements apply to the employees of those short lines.

[24] The TCRC submits that it is not disputed that CN is once again the employer of all of the short line employees who perform the crafts and trades that it is certified to represent on the mainline. It points out that CN has a single labour relations department that deals with all of the employees, both mainline and short line. TCRC argues that it makes no labour relations sense to keep the employees

in fragmented bargaining units and contends that it is counter-productive, inefficient and harmful to effective labour relations to maintain separate bargaining units. It argues that the two certification orders issued by the Board in 2008 for employees at ANY and MKNR were issued in a different context, in which the Board was not asked to consider the issues that are now before it in these applications.

[25] With respect to the SAR, the TCRC argues that it holds the bargaining rights for both locomotive engineers and conductors on the CN mainline and takes the position that, if CN is determined to be the proper employer of the running trades employees at the SAR, those employees are within the scope of its mainline bargaining units.

B–The CAW

[26] The CAW is the certified bargaining agent for shopcraft employees at CN (bargaining unit order 6495-U, issued June 29, 1994) and was voluntarily recognized by the former owner of MKNR, RaiLink, for the shopcraft employees on that short line following its purchase of the short line from CN in May 1998. The various unions representing employees working on the MKNR, including the CAW, formed a voluntary council of trade unions and negotiated a collective agreement with RaiLink Canada Ltd. that expired on May 2, 2008. CN repurchased the MKNR in 2006 and the CAW served notice to bargain for renewal of the collective agreement on February 25, 2008. The parties reached an impasse in negotiations after four days of bargaining, and in September 2009, the CAW wrote to CN, suggesting that the employees at MKNR represented by the CAW be covered by the terms and conditions of the national collective agreement. CN advised the CAW that it would not consent to this request. As of the date of the CAW's application, the parties had not yet concluded a new collective agreement.

[27] The CAW states that the MKNR employees it represents have been operationally reintegrated into CN and should be integrated into the national bargaining unit that it also represents for labour relations purposes. It asks the Board to declare that a sale of business has taken place, and that CN is the successor employer to RaiLink Canada Ltd. for the MKNR division. It asks the Board to declare that the MKNR employees who were formerly employed by RaiLink Canada Ltd. are

included under and subject to the CAW's certificate for the national bargaining unit of CN shopcraft employees. In the alternative, the CAW asks that CN be declared a single employer with RailLink Canada Ltd. and that the terms and conditions of employment contained in the CAW-CN collective agreement be applied to the MKNR shopcraft employees and that these employees be found to be in the national CN shopcraft bargaining unit.

[28] The CAW also points out that its situation is different than that of the TCRC, in that the Board has never issued a certification order finding that a separate bargaining unit for the short line is appropriate for collective bargaining. In the CAW's case, CN owned and operated a rail yard/repair shop in McLennan, Alberta that was transferred to RailLink as part of its purchase of the MKNR in May 1998. When the MKNR operated this yard, the CAW estimates that there were approximately ten active shopcraft employees performing inspection, repair and maintenance on rail cars and locomotives. Since the sale of the MKNR short line back to CN, the CAW says there are some half dozen active employees performing this shopcraft work and they are all in classifications for which the CAW is the certified bargaining agent on the mainline. The CAW contends that the essential work of shopcraft employees, whether on the short line or the mainline, is the same. It admits that certain heavy repair work is not performed in the McLennan yard, as it does not have all the necessary equipment.

[29] The CAW argues that there are a number of indicia of the complete integration of MKNR employees into CN. It points to the manner in which senior CN officials have engaged in the administration of labour relations for MKNR employees and to the posting of notices in the McLennan yard advertising vacant positions at various locations within CN's Mountain Region. The CAW argues that the current separation of the short line employees from their colleagues on the mainline for labour relations purposes is unworkable and that the short line employees should have their terms and conditions of employment governed by the national shopcraft agreement. It submits that conducting negotiations for a separate unit of half a dozen workers is inefficient and that including these workers in the national shopcraft bargaining unit will improve job mobility and job security for its members and flexibility and efficiency for the employer.

[30] The CAW has made no representations with respect to the SAR, other than to note that it holds representation rights for the running trades employees by virtue of a certification issued by the Alberta Labour Relations Board in 2002 when this line was in provincial jurisdiction. A number of the employees at the SAR have advised the Board that they wish to continue being represented by the CAW.

C–The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union (United Steelworkers)

[31] By virtue of certification order no. 8745-U issued on November 25, 2004, the USW is the bargaining agent for a national unit of CN employees engaged in track maintenance. CN and the USW are party to a collective agreement for this unit that is in force until December 31, 2011.

[32] As noted above, the USW has filed an application pursuant to section 18 and 18.1 of the *Code* (Board file no. 26722-C), seeking to add some 12 employees of CN working on the SAR to its national bargaining unit. The USW takes the position that these short line employees are properly part of the national bargaining unit for which it holds representation rights. It suggests that it is possible for the parties to negotiate special working conditions for the SAR maintenance of way employees by way of a schedule or subagreement to the national collective agreement.

[33] With respect to the TCRC and CAW applications, the USW asserts that the maintenance of way employees at ANY, MKNR and LWR perform the same work as is performed by employees in the USW's national maintenance of way bargaining unit. In the USW's view, those positions are clearly within the scope of the national bargaining unit for which it was certified in 2004 and should be reintegrated into that unit and be covered by the USW collective agreement with CN.

[34] The USW argues that CN's suggestion that the short line employees should remain in separate bargaining units would not result in an appropriate bargaining unit configuration and makes no labour relations sense. The USW relies on the Board's decision in *Chemin de fer d'intérêt local interne du Nord du Québec*, 2010 CIRB 517, in which the Board held that employees performing maintenance of way functions for a short line in Quebec were part of the USW's national bargaining unit, notwithstanding a collective agreement between the parties that purported to carve these

employees out of the national unit. It asks that the Board issue an order that the CN maintenance of way employees assigned to the ANY, MKNR and LWR are also covered by its certification for the national bargaining unit at CN and the collective agreement applicable to that unit.

D–Teamsters Canada Rail Conference, Maintenance of Way Employees Division

[35] At the time that CN sold the Alberta short lines at issue in this matter, the certified bargaining agent for all CN maintenance of way employees was the Brotherhood of Maintenance of Way Employees (BMWE). Neither ANY or LWR recognized the BMWE following the sale and it does not appear that the BMWE sought successor rights or provincial certification orders in respect of the employees at those short lines. However, RaiLink voluntarily recognized the incumbent bargaining agents for each of the employee groups, including the BMWE, working on the MKNR short line. Although the USW replaced the BMWE as the bargaining agent for maintenance of way employees at CN as a result of a displacement proceeding (Order no. 8745-U, issued November 25, 2004), maintenance of way employees at MKNR remained members of the BMWE. The employer's voluntary recognition of the BMWE was transferred to the TCRC-MWED when the BMWE transferred jurisdiction over its Canadian members to the TCRC in 2004. The Board issued an order confirming the transfer of jurisdiction from BMWE to TCRC-MWED in respect of a number of railways, including MKNR, on December 21, 2004 (Board Order no. 8766-U).

[36] Although the TCRC-MWED characterizes CIRB Order no. 8766-U as a certification order, the order in fact only recognizes that TCRC-MWED is the successor to the BMWE. It does not grant the TCRC-MWED any greater rights than the BMWE had with respect to the MKNR employees. The BMWE and MKNR were parties to a collective agreement (Agreement 3.3) negotiated in March 2004, which expired on May 2, 2008. By virtue of order no. 8766-C, as the successor bargaining agent to the BMWE, the TCRC-MWED became a party to this collective agreement. On April 8, 2008, the TCRC-MWED served a notice to bargain on CN for the MKNR unit. Negotiation meetings took place in January 2009, but the parties have been unable to reach agreement on a new collective agreement.

[37] The TCRC-MWED agrees that CN is the successor employer to MKNR, but asserts that it, and not the USW, should remain the bargaining agent for all maintenance of way employees assigned by CN to the MKNR. It argues that there is no evidence that the current bargaining unit for maintenance of way employees at MKNR is inappropriate and that the tests developed by the Board under sections 18 and 18.1 of the *Code* have not been met by the USW. The TCRC-MWED also argues that the USW has not demonstrated that it has support among the employees that it seeks to add to its national bargaining unit and in particular those working at MKNR, and argues that the double majority rule should apply in the circumstances of this case.

[38] TCRC-MWED argues that there are important labour relations reasons why the current maintenance of way bargaining unit at MKNR is appropriate and should be maintained. In this respect, it points to the differences in the collective agreements applicable to maintenance of way employees at MKNR and at CN, such as start times and a vacation supplement and Northern Living Allowance for some employees at MKNR, which were negotiated to address the needs of employees at MKNR. TCRC-MWED argues that the MKNR employees have a different community of interest from those in the national unit represented by the USW. The TCRC-MWED asks the Board to dismiss the USW's position that all short line maintenance of way employees be subsumed into its national mainline bargaining unit, and maintain a separate bargaining unit for maintenance of way employees at MKNR.

E–Canadian National Railway Company

[39] CN does not deny that it has repurchased the ANY, MKNR, LWR and SAR short lines. However, it opposes the TCRC, CAW and USW applications and asks that they be dismissed without a hearing.

[40] CN states that the extensive costs of track and infrastructure maintenance and repairs, labour costs for operating in remote areas of the country and the sparse density of the traffic of cars and commodities on the short lines made them unprofitable for CN and led to the decision to divest itself of these lines in the late 1990s. It indicates that, at the time of the divestiture, short line employees

were offered the option of relocating elsewhere within the CN mainline operations or accepting employment with the new operators with a severance package from CN.

[41] CN suggests that the smaller regional operators that purchased the short lines had less overhead and were able to utilize employees and equipment with more flexibility and efficiency and were thus able to sustain a profitable operation. Nevertheless, by 2005, the properties involved in these applications were in poor repair and were about to be abandoned by the owners, who could not afford the necessary infrastructure investments to bring the lines back to efficient standards of maintenance and operations. CN was of the view that these feeder lines should be kept alive, provided that operating costs could be maintained at the lowest level possible, and therefore repurchased the properties. CN states that it accepted all of the employees who wished to continue working on the various short lines and assumed all existing working conditions and collective agreements with the respective bargaining agents.

[42] CN argues that the short lines operate in a separate and distinct manner from its mainline operations and that the economic realities and viability of those lines remain distinct today. It submits that the nature of the short lines' business requires composite work assignments and flexible schedules to ensure a lower cost of operation and that these conditions are not permitted by the collective agreements applicable to the mainlines. CN argues that with the limited density of traffic, the short lines have disproportionately low revenue to cost ratios available to maintain the infrastructure.

[43] CN submits that as a result of these economic realities, the working conditions of employees on the short line railways are necessarily different from those in the national bargaining units, and that the two groups do not share a community of interest. It states that short line employees generally reside within the community they serve and their assignments generally contemplate that they will be home every night, a very different concept from mainline operations, and observes that not a single short line employee sought a voluntary transfer to vacancies in the national bargaining unit when CN invited applications to fill vacancies in other parts of Western Canada. CN suggests that adding the short line employees into the national bargaining units would create substantial issues related to assignments, scheduling, working conditions, seniority and bumping rights, without any

operational or labour relations improvement. In particular, it points out that the affected running trades employees are subject to an hourly wage rate system, which has been resisted by the national units, and that integration would result in friction and disruption.

[44] CN also points out that only a few of the current short line employees were part of the national units prior to their devolution from CN. It states that there is no interchange or transfer of short line personnel to positions on the mainline, and that only very exceptionally (such as in case of accidents or extreme weather conditions) will mainline personnel be assigned to assist on a short line to address the temporary condition. CN states that it has made best efforts to attempt to negotiate or renew the short line collective agreements but that all parties concentrated their efforts in 2009 and 2010 on the renegotiation of the mainline collective agreements.

[45] With respect to the TCRC's application, the employer argues that, subsequent to the repurchases and as a result of sale of business applications filed by the TCRC, the Board issued certification orders in June 2008 which held that a separate bargaining unit of locomotive engineers and conductors at ANY was appropriate (Order no. 9472-U) and that a separate bargaining unit of conductors and assistant conductors at MKNR was appropriate (Order no. 9473-U). It argues that the conditions that prevailed at the time these certification orders were issued have not changed materially and there has been no intervening event, structural or operational, that would suggest that the current bargaining unit structure has become inappropriate. In CN's submission, the Board ruled on the TCRC's sale of business applications in 2008; the TCRC has not met its burden of proof under section 18.1 of the *Code* to establish that the current bargaining unit structure is inappropriate and/or there are compelling reasons why it should be changed at this time; and the Board should not use the instant applications as an opportunity to reconsider, pursuant to section 18 of the *Code*, the decisions that it made in 2008. CN also notes that the TCRC does not represent the employees at LWR and suggests that it should organize these employees by means of a certification application, rather than attempting to sweep them into the national unit by means of this application.

[46] With respect to the CAW's application, CN makes many of the same arguments that it made with respect to the TCRC application. It states that a separate unit of shopcraft employees at MKNR continues to be an appropriate bargaining unit, just as the separate unit for conductors certified by

the Board in 2008 is appropriate. It argues that the conditions that prevailed at the time that the MKNR voluntarily recognized the CAW have not changed materially and that successive collective agreements were negotiated for the bargaining unit. CN points out that there are seven employees in the bargaining unit and that only two of these employees worked for CN prior to the 1998 sale. CN argues that these employees enjoy working conditions and assignments that are different from the rules and provisions applicable to the national bargaining unit. CN argues that integrating these employees into the national bargaining unit would create an unhealthy scenario for sound labour relations without improving work place efficiency. It also submits that the application is a bargaining strategy by the CAW to achieve something that it is unable to achieve through collective bargaining.

[47] With respect to the USW application, CN opposes the inclusion of the SAR maintenance of way employees in the national bargaining unit. It argues that the duties and responsibilities of the affected employees are not identical to those of employees in the mainline bargaining unit, as short line employees perform a wider range of duties. CN argues that SAR classifications are unique to the short line context and that the economics and smaller customer base served by a short line requires composite duties, greater flexibility and adaptive work forces. CN makes many of the same arguments regarding the potential effects of granting the USW's application as it made with respect to the TCRC and CAW applications. It further states that amendments to the mainline bargaining unit description would be required in order to integrate the SAR employees into that unit, and argues that the Board cannot and should not amend the classifications of any existing national bargaining unit through an application of this type.

[48] Consistent with its position that individual bargaining units are appropriate for short line employees, CN does not oppose the USW's application for certification for a unit composed solely of the SAR maintenance of way employees.

[49] CN points out that the multiple short line units have a better record of industrial peace than the mainline bargaining units, as far fewer grievances are filed by short lines employees per capita and there have been no work stoppages related to collective bargaining on the short lines, while there has been considerable conflict on the mainline in the past six years. In conclusion, CN argues that the

applications serve no legitimate industrial relations purpose and are likely to bring disharmony where there currently is peace.

IV–The Law

[50] The relevant provisions of the *Code* read as follows:

> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.
>
> 18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.
>
> (2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board
> (*a*) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and
> (*b*) may make any orders it considers appropriate to implement any agreement.
>
> (3) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.
>
> (4) For the purposes of subsection (3), the Board may
> (*a*) determine which trade union shall be the bargaining agent for the employees in each bargaining unit that results from the review;
> (*b*) amend any certification order or description of a bargaining unit contained in any collective agreement;
> (*c*) if more than one collective agreement applies to employees in a bargaining unit, decide which collective agreement is in force;
> (*d*) amend, to the extent that the Board considers necessary, the provisions of collective agreements respecting expiry dates or seniority rights, or amend other such provisions;
> (*e*) if the conditions of paragraphs 89(1)(*a*) to (*d*) have been met with respect to some of the employees in a bargaining unit, decide which terms and conditions of employment apply to those employees until the time that a collective agreement becomes applicable to the unit or the conditions of those paragraphs are met with respect to the unit; and
> (*f*) authorize a party to a collective agreement to give notice to bargain collectively.
>
> 35.(1) Where, on application by an affected trade union or employer, associated or related federal works, undertakings or businesses are, in the opinion of the Board, operated by two or more employers having common control or direction, the Board may, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business. Before making such a declaration, the Board must give the affected employers and trade unions the opportunity to make representations.
>
> (2) The Board may, in making a declaration under subsection (1), determine whether the employees affected constitute one or more units appropriate for collective bargaining.

44.(1) In this section and sections 45 to 47.1,

"business" means any federal work, undertaking or business and any part thereof;

"provincial business" means a work, undertaking or business, or any part of a work, undertaking or business, the labour relations of which are subject to the laws of a province;

"sell", in relation to a business, includes the transfer or other disposition of the business and, for the purposes of this definition, leasing a business is deemed to be selling it.

(2) Where an employer sells a business,

(*a*) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;
(*b*) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;
(*c*) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and
(*d*) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

(3) Where, as a result of a change of activity, a provincial business becomes subject to this Part, or such a business is sold to an employer who is subject to this Part,

(*a*) the trade union that, pursuant to the laws of the province, is the bargaining agent for the employees employed in the provincial business continues to be their bargaining agent for the purposes of this Part;
(*b*) a collective agreement that applied to employees employed in the provincial business at the time of the change or sale continues to apply to them and is binding on the employer or on the person to whom the business is sold;
(*c*) any proceeding that at the time of the change or sale was before the labour relations board or other person or authority that, under the laws of the province, is competent to decide the matter, continues as a proceeding under this Part, with such modifications as the circumstances require and, where applicable, with the person to whom the provincial business is sold as a party; and
(*d*) any grievance that at the time of the change or sale was before an arbitrator or arbitration board continues to be processed under this Part, with such modifications as the circumstances require and, where applicable, with the person to whom the provincial business is sold as a party.

45. In the case of a sale or change of activity referred to in section 44, the Board may, on application by the employer or any trade union affected, determine whether the employees affected constitute one or more units appropriate for collective bargaining.

46. The Board shall determine any question that arises under section 44, including a question as to whether or not a business has been sold or there has been a change of activity of a business, or as to the identity of the purchaser of a business.

V–Analysis and Decision

A–The Section 35 applications

[51] In *Murray Hill Limousine Service Ltd.* (1988), 74 di 127 (CLRB no. 699), the Board refined and elaborated on the five preliminary criteria, originally set out in *The Canadian Press* (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60), which must be met before the Board will consider issuing a declaration of single employer under section 35 of the *Code*. These criteria are:

(1) that there be two or more enterprises (businesses);
(2) both under federal jurisdiction;
(3) that are associated or related;
(4) of which at least two, but not necessarily all, are employers; and
(5) which are under common control or direction.

[52] In this case, the Board finds that the first criteria is not met. Since the repurchase by CN of the various short line properties, it is the sole owner and operator of those assets and is the sole employer of the employees working on these lines. There is no other associated or related enterprise or business involved at this time. Accordingly, the Board dismisses those portions of the applications that are based on section 35 of the *Code*.

B–The Section 45 applications

[53] The Board has consistently held that the consequences of a sale of business occur automatically, without its intervention– the bargaining agent and the collective agreement follow the employees to the new employer. When a "sale of business" application is made to the Board, it is normally for the purpose of amending certification orders to reflect and confirm these consequences. However, when there are disputes, section 46 of the *Code* authorizes the Board to determine, among other things, whether a business has been sold and the identity of the purchaser. Although the obvious purpose of section 44 of the *Code* is to preserve the labour relations *status quo* when a business is sold, section 45 of the *Code* gives the Board the discretion to determine whether the employees affected constitute one or more units appropriate for collective bargaining. Applications under section 45 of

the *Code* that involve a review of the bargaining unit structure bring into play the provisions of sections 18.1(2) to (4) of the *Code*, which give the Board the necessary powers to determine questions that arise, including the amendment of bargaining unit descriptions and certification orders.

[54] In *Expertech Network Installations Inc.*, 2002 CIRB 182, the Board described the distinctions it applies in interpreting sections 18.1, 35 and 45 of the *Code*:

> [105] The Board agrees with the submissions of the CUCW's counsel that a declaration of sale of business pursuant to section 44 of the *Code* does not guarantee a review of the existing bargaining units, in spite of an application under section 45 of the *Code*. The Board will not undertake a review of the bargaining units in place unless it finds that a review is called for. To reach that conclusion, the Board, for all practical purposes, reviews the existing structure to determine if the units are still appropriate for collective bargaining.
>
> [106] Nevertheless, the Board is of the view that when an application for review is filed pursuant to section 45 (or section 35, which contains an identical provision with regard to the review of units), it must determine **whether the employees affected constitute one or more units appropriate for collective bargaining**. In order to make that decision, the appropriateness of the existing units must necessarily be reviewed in the context of a sale or a common employer, unlike section 18.1(1), which contemplates a review in a different context.
>
> [107] Although the Board takes the general principles which guide the review of bargaining units into account, and although the principles and the process which follows as provided by subsections 18.1(2) to (4) are the same for sections 18.1(1) and 45 (*Sécur Inc., supra*), the Board must, nonetheless, also comply with the respective wording of each of the provisions under which the review of the bargaining units has been initiated.
>
> [108] Unlike section 45, section 18.1(1) provides that the Board must be satisfied that the units in question "are no longer appropriate for collective bargaining." This wording implies the demonstration that the current bargaining unit structure is inappropriate, a sort of negative proof. Section 45, however, provides that the Board may decide "whether the employees affected constitute one or more units appropriate for collective bargaining." Although this nuance may appear subtle, the fact remains that Parliament chose these different terms for section 45, and gave the Board positive authority to determine the number of units that are appropriate.
>
> [109] Section 18.1(1) is the mechanism under which either an employer or a bargaining agent can apply independently, in the absence of any of the circumstances necessary to file the application within sections 35 or 45 of the *Code*, to have the Board review bargaining unit structures. As can be seen in the earlier quotation from the Sims Report, because of the "substantial disruption and expense" that bargaining unit reviews cause, it recommended that Parliament include a test for applicants to meet in order for the Board to undertake such a review absent a section 35 declaration or an application pursuant to section 45. The Sims Report suggested that applicants should have to "satisfy the Board that there are serious problems with the current bargaining structures," "[o]therwise there is no justification for interfering with the employees' choice of bargaining agent." **This is reflected in the *Code* by Parliament's addition of the words "if it is satisfied that the bargaining units are no longer appropriate for collective bargaining" in section 18.1(1) of the *Code*, a wording that does not exist in either of sections 35(2), 45 or 18.1(2).**

[110] In the decisions mentioned above, for which the Board nevertheless resorted to demonstrating that the units in question were "no longer appropriate for collective bargaining," even when applying section 45, the Board then wanted to make an even clearer demonstration of the need to restructure the existing units by exercising the discretion and making use of the flexibility that section 45 confers upon it.

[111] **Although section 45 does not call for the Board to be "satisfied that the bargaining units are no longer appropriate for collective bargaining," within the meaning of section 18.1(1), and although section 45 instead gives the Board the authority to "determine whether the employees affected constitute one or more units appropriate for collective bargaining," the Board necessarily must review the existing structure, including the viability of the structure in light of the changes that have taken place, in order to arrive at a decision. If, in reality, the consequence may be the same regarding the need to restructure the units, the required level of proof is different in the sense that it may be easier to prove in the context of a declaration of sale or a common employer, by the very nature of the changes that have taken place, as is the case here.**

[112] Moreover, one of the excerpts referred to by counsel for the CUCW confirms this interpretation. In *Air Canada et al.*, [2001], *supra*, the Board seems to clearly distinguish section 45 from section 18.1(1) and the burden imposed by the latter:

> [52] ... the process of reviewing the structure of bargaining units is now set in motion in any of the circumstances expressly provided for in the legislation. Section 18.1(2) sees this being done in three circumstances. The first is upon a determination by the Board that the structure of the bargaining units is no longer appropriate for collective bargaining under section 18.1(1) itself. Compelling reasons should no doubt be required in such circumstances. **Section 45 provides a second route and allows the Board on application to determine** whether bargaining units affected by a sale or change of activity under section 44 are no longer appropriate for collective bargaining. The present case, however, is not one proceeding under section 45 or under section 18.1(1). The present case was initiated as a consequence of the declaration of single employer under section 35(1).
> (page 27; emphasis added)

(Emphasis added)

[55] Thus, while section 44 of the *Code* preserves the *status quo* in the event of a sale of business, section 45 provides the Board with the ability, on application by the employer or an affected trade union, to review the bargaining unit structure that results from the normal operation of section 44. The distinction between sections 45 and 18.1 identified above make it clear that, when dealing with an application for a bargaining unit review consequent to a sale of business, the Board need not impose the strict test that it has established under section 18.1 of the *Code* to satisfy itself that the existing bargaining unit structure is "no longer appropriate for collective bargaining" (see *Canadian National Railways*, 2009 CIRB 446). The mere fact that a sale of business has occurred and one of the affected parties has applied to the Board under section 45 is sufficient to trigger a

bargaining unit review if the Board feels it is warranted by the circumstances. In conducting a review pursuant to section 45, the Board will consider all of the factors that it takes into account in a review pursuant to section 18.1, including the history of bargaining, the interests of the employees in the various bargaining units and the nature of the work that they perform (see: *Sécur Inc.*, 2001 CIRB 109; *Island Tug and Barge Limited and Canadian Merchant Service Guild*, 2001 CIRB 112; and *Expertech Network Inc.*, *supra*). Certain factors, such as evidence of organizational change and the intermingling of employees, may make it obvious that the existing bargaining unit structure requires revision. In addition, the Board will consider whether there is a bargaining unit configuration that is more likely to lead to harmonious labour-management relations. As the Board stated in *Sécur Inc.*, *supra*:

> [60] The question of reconfiguring the units is not exempt from the fundamental objectives of the *Code* of which the Board is required to establish the practical side. Accordingly, the reconfiguration of bargaining units must promote the employees' exercise of the rights conferred by the *Code* while enabling the business to be operated properly. The Board must therefore deal with a reconfiguration with a sufficiently long-term vision to contribute to the development of relations between the bargaining agents and the employer with regard to the proposed units. While considering these general principles, the Board will nonetheless take into account the specific facts of each application.

[56] CN does not dispute the fact that a sale of business took place when it repurchased the four short lines at issue in these applications. With respect to the portions of the TCRC application that relate to ANY and MKNR, CN contends that the Board has already dealt with the union's sale of business application and found that separate bargaining units for these short lines are appropriate. However, the Board notes that both certification orders that it issued as a result of these business sales (9472-U and 9473-U) were dealt with in isolation. The instant applications (26722-C, 27730-C and 27767-C) present the first opportunity that the Board has had to look holistically at the bargaining unit structure for the CN short lines in Alberta.

[57] In their submissions, the parties have presented the Board with two diametrically opposed options: CN and the TCRC-MWED arguing for maintenance of the *status quo* and the TCRC, CAW and USW arguing for the inclusion of the short line employees into their existing mainline bargaining units.

[58] A review of the *status quo* in this case reveals that the parties have been unable to negotiate collective agreements for the various short line bargaining units, despite the length of time that has passed since the previous agreements expired. In making this observation, the Board does not seek to place blame on any party. The current situation is simply reflective of the fact that, given the relatively small number of employees in each bargaining unit, the negotiation of new collective agreements is not a high priority for either the employer or the unions. This is understandable in view of the demands placed on their time and relationships by the much larger mainline bargaining units. The current reality is sufficient justification for the Board to conduct a review of the existing bargaining unit structure for all of CN's short lines in Alberta, as contemplated in and authorized by sections 45 and 18.1(2) to (4) of the *Code*.

[59] When the Board determines the contours of bargaining units, its primary purpose is to create units conducive to constructive collective bargaining and harmonious labour management relations. Between the two extremes advocated by the parties, there are a number of other bargaining unit configurations that may be more appropriate than the existing structure. For example, the Board could create a single bargaining unit for all short line employees in Alberta. Alternatively, the bargaining units could be delineated on a traditional craft or trade basis–for example, "all shopcraft employees working on CN short lines in Alberta," "all maintenance of way employees working on CN short lines in Alberta" and "all running trades employees working on CN short lines in Alberta." A third option would be to establish bargaining units consisting of all employees at each of the four Alberta short lines. All of these options would require the conduct of a representation vote to determine which of the incumbent bargaining agents would take over representation rights for the revised bargaining unit(s).

[60] In their respective submissions, the parties have not, to date, contemplated the possibility of the additional options identified above. In coming to a conclusion with respect to this matter, the Board will require their respective submissions on the practicality and appropriateness of each option. However, prior to soliciting such submissions, the Board wishes to provide the parties with one further opportunity, pursuant to section 18.1(2)(*a*) of the *Code*, to reach agreement with respect to the determination of the appropriate bargaining unit(s) for CN short line employees in Alberta. Accordingly, the Board orders the parties to collectively undertake discussions aimed at reaching

such an agreement **within the 60 days following the date of this decision**. Failing such agreement, the parties are to provide the Board with their written submissions on the question **no later than April 15, 2011.**

[61] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Daniel Charbonneau
Member

Patrick Heinke
Member